Office - Supreme Court, U.S.
FILED
[illegible] 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,

Petitioners,

v.

ROBERT W. KELLEY, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE AND RESPONDENTS' REPLY TO BRIEF OF THE UNITED STATES

JACK GREENBERG
JAMES M. NABRIT, III
THEODORE M. SHAW
BILL LANN LEE*
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

AVON N. WILLIAMS, JR.
RICHARD H. DINKINS
203 Second Avenue, North
Nashville, Tenn. 37201
(615) 244-3988

Attorneys for Respondents

*Counsel of Record

No. 82-702

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

==========

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,

Petitioners,

v.

ROBERT W. KELLEY, et al.

==========

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

==========

MOTION FOR LEAVE TO FILE REPLY BRIEF

==========

Respondents respectfully request leave to file the attached reply to the brief of the United States.

The petition for a writ of certiorari was filed October 22, 1982. Respondents' brief in opposition was filed November 2,

1982. The brief for the United States as amicus curiae in support of petitioner was filed on or around November 12, 1982, and not received by respondents' counsel until November 17, 1982. Accordingly, respondents have had no opportunity to respond to the brief of the United States.

Respectfully submitted,

'JACK GREENBERG
'JAMES M. NABRIT, III
THEODORE M. SHAW
BILL LANN LEE*
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

AVON N. WILLIAMS, 'JR.
RICHARD H. DINKINS
203 Second Avenue, North
Nashville, Tenn. 37201
(615) 244-3988

*Counsel of Record

Attorneys for Respondents

Table of Cases

	Page
Brown v. Board of Education, 349 U.S. 294 (1955)	3
Columbus Board of Education v. Penick, 443 U.S. 449 (1979)	3,9
Cooper v. Aaron, 358 U.S. 1 (1975)	4
Davis v. Board of School Com'rs, 402 U.S. 33 (1971)	4,7,8
Dayton Board of Education v. Brinkman, 443 U.S. 538 (1979)	3,9
Estes v. Metropolitan Branch, Dallas NAACP, 444 U.S. 437 (1980)	9
Monroe v. Board of Com'rs, 391 U.S. 450 (1968)	4
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)	passim
United States v. Scotland Neck Bd. of Educ., 467 U.S. 484 (1972)	4

Page

Wright v. Council of City of Emporia, 407 U.S. 451 (1972) 4

Other Authority:

Brief for the United States as Amicus Curiae, October Term 1970, Nos. 281, 349, 436 8

No. 82-702

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

==========

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,

Petitioners,

v.

ROBERT W. KELLEY, et al.

==========

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

==========

RESPONDENTS' REPLY TO BRIEF OF THE UNITED STATES

==========

Respondents reply as follows to several arguments advanced by the United States.

1. The United States asserts that the district court interpreted Swann v. Charlotte-Mecklenburg Board of Education, 402

U.S. 1 (1971), as permitting consideration of certain "educational, social and economic costs in fashioning relief" with respect to pupil assignment. Brief, pp. 9-12. That claim has no basis in the record. The district court was of the erroneous view that Swann no longer had precedential value because "the definition of a 'unitary' school system has expanded from Brown to Milliken from a mere destruction of barriers, to pupil assingment, to remediation and quality education." A-106, see A-105-113. The court, therefore, rejected as altogether inapplicable the use of any "Swann-type remedy" as "a 'more-of-the-same' type of remedy," A-108, 109, after "weighing benefits of the Swann-type remedy against its burdens." A-136. As the court of appeals properly concluded: "[t]he errors ... we found in the District

Court's opinions and orders, originate with his apparent conclusion that the unanimous opinion of the Supreme Court in Swann has somehow been overruled or eroded." A-9. The district court, in short, did not start out with the aim of achieving desegregation of students. That was a fundamental legal error.[1/]

The only "educational, social and economic cost" of a "Swann-type remedy," Brief, 10-11, discussed by the district court was the hostility of segments of the white community and expense. A-109-113, A-114-116. Bowing to community hostility and cost considerations was fundamental

---

1/ Columbus Board of Education v. Penick, 443 U.S. 449, 458-59 (1979); Dayton Board of Education v. Brinkman, 443 U.S. 526, 538 (1979).

legal error.[2/]

2. The United States asserts that the Sixth Circuit barred the district court from considering whether the transportation of students in grades 1-4 "risk[s] the health of the children or significantly impinge[s] on the educational process," Brief, p. 12, quoting Swann, supra, 402 U.S. at 30-31. That claim has no basis in the record. The district court, in reliance on its discussion of white hostility and expense, opted for neighborhood schools

---

2/ United States v. Scotland Neck Bd. of Educ., 467 U.S. 484 (1972); Wright v. Council of City of Emporia, 407 U.S. 451 (1972); Monroe v. Board of Com'rs, 391 U.S. 450, 459 (1968); Cooper v. Aaron, 358 U.S. 1 (1957); Brown v. Board of Education, 349 U.S. 294, 300 (1955) (white hostility); Swann, supra, 402 U.S. at 29-31; Davis v. Board of School Com'rs, 402 U.S. 33, 36-38 (1971) (expense not a factor in considering feasibility of student transportation remedy).

for all students in grades 1-4[3/] without conducting any particularized time and distance studies. A-116-117. Subsequent efforts to present evidence about the feasibility of pairing and noncontiguous zoning for most students in the lower grades was precluded. A-136. The court of appeals reversed and specifically ordered the district court to "include these children within a pupil assignment program drafted in compliance with this opinion, except where inclusion would "risk the health of the children or significantly impinge on the educational process' within the meaning of Swann." A-19.

3. The United States asserts that there is a need for "guidance regarding the

---

3/ Kindergarten students would attend neighborhood schools under all the plans submitted by the parties.

proper interpretation of Swann." Brief, p. 12. The record, as discussed above, shows that the remand and the instructions of the Sixth Circuit to the district court to apply Swann raise no such question. Even assuming arguendo that a substantial question is presented, certiorari is not appropriate at this juncture of the litigation where the district court has had no opportunity to apply Swann.

Moreover, the very issue in Swann was whether "the pairing and grouping of elementary schools would place an unreasonable burden on the board or the system's pupils." 402 U.S. at 10. The unanimous holding of Swann was that the transportation of students, including students in grades 1-4, was "reasonable, feasible and workable." 402 U.S. at 31. Indeed, in the

companion case, Davis v. Board of School Com'rs, 402 U.S. 33, 38 (1971), the district court's elementary school neighborhood assignment plan was unanimously rejected because, as here, "inadequate consideration was given to the possible use of bus transportation and split zoning." As Chief Justice Burger's opinion put it, neighborhood school zoning "is not the only constitutionally permissible remedy; nor is it per se adequate to meet the remedial responsibilities of local boards." 402 U.S. at 37.[4/]

4/ The United States asserts that the failure of the district court to use a range based on districtwide white and black student enrollment as a "starting point" for middle and high school students was not erroneous because use of a 15% either race minimal quota was nevertheless effective. Brief, pp. 13-14, quoting Swann, supra, 402 U.S. at 25. However, the United States does not and cannot assert that a more effective secondary student remedy cannot

What the government actually seeks is to overrule Swann and Davis, and to have the Court adopt a position against student assignment remedies which the government advanced and this Court rejected more than a decade ago.[5/] Such a course of action is wholly inappropriate in light of the sanction given the transportation remedy scarcely three years ago where, as here, "a constitutional violation of sufficient

---

4/ continued

be devised within the guidelines of Swann. That the proposed secondary student enrollment is more effective under the 1971 plan is not determinative because, as the government concedes, the board's implementation of the court's order [of 1971] amount[ed] to a de jure segregation." Brief, p. 12 citing A-45.

5/ The position of the government that the neighborhood schol system "is constitutionally acceptable in desegregating urban schol systems" was originally advanced in its brief in Swann and Davis. Brief for the United States as Amicus Curiae, October Term 1970, Nos. 281, 349, 436, p. 24.

magnitude has been found."[6/] Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Dayton Board of Education v. Brinkman, 443 U.S. 526 (19779). Indeed, the issue presented by the government is the precise issue which the Court declined to reconsider as recently as two years ago. Estes v. Metropolitan Branch, Dallas NAACP, 444 U.S. 437 (1980) (writs of certiorari dismissed as improvidently granted).

6/ Columbus Board of Education v. Penick, 443 U.S. 449, 469 (1979) (Burger, C.J., concurring) ("[O]ur prior decisions have sanctioned [the] use [of student transportation] when a constitutional violation of sufficient magnitude has been found. We cannot retry these sensitive and difficult issues in this Court; we can only set the general legal standards and, within the limits of appellate review, see that they are followed").

Respectfully submitted,

'JACK GREENBERG
'JAMES M. NABRIT, III
THEODORE M. SHAW
BILL LANN LEE*
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

AVON N. WILLIAMS, 'JR.
RICHARD H. DINKINS
203 Second Avenue, North
Nashville, Tenn. 37201
(615) 244-3988

*Counsel of Record

Attorneys for Respondents

November 18, 1982